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# GOVERNMENT BY INJUNCTION

## SPEECH

BY

## HON. JOHN A. McMAHON

TO THE MEMBERS
OF THE

OHIO STATE BAR ASSOCIATION

AT DAYTON, OHIO
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# GOVERNMENT BY INJUNCTION.

## Speech by Hon. John A. McMahon to the Members of the Ohio State Bar Association.

[From the Dayton (Ohio) Daily News, Jan. 24, 1920.]

Welcoming to Dayton the members of the Ohio State Bar Association, at their annual meeting in this city Friday, Hon. John A. McMahon, dean of the Dayton bar, delivered an address on "Government by injunction," in which he brought out many points of vital interest to every citizen, and especially to the laboring men of the country. Handling the subject impartially and careful to credit both sides in our present labor disputes with all things to which they are entitled, he reviewed in detail the situation as it exists to-day, and pointed out conditions certain to obtain unless both labor and capital put a proper construction upon the meaning of "strikes."

"There is no recorded case where workingmen have been compelled to return to work by the order of any court," declared Judge McMahon in the course of his remarks. "Of course a general coal or railroad strike intended to freeze or starve the general public presents a special question. Every Government is entitled to preserve itself or its people when the conditions arise that necessarily follow a general concerted and simultaneous quitting of work."

He pays a tribute to labor, and reviews the platform recently adopted by organizations affiliated with the American Federation of Labor. In doing so he points out that the courts of this country offer to the laboring man his greatest protection, and shows that without them conditions bordering upon those now existing in Russia would prevail.

Of such vital interest was Judge McMahon's address and, carrying as it does so much that is valuable to labor and capital alike, it is here reproduced in its entirety, eliminating only a few pleasantries introduced in welcoming the visiting attorneys:

"I have been chosen, as the senior member of the Dayton bar, to welcome you to our city. It is a high honor. I doubt my physical capacity to be equal to the occasion. As to the mental outfit you must be the judge. It is not for me to depreciate myself. I can only say, in the cryptic language of an ancient Dayton lawyer, in delivering a Fourth of July address many years ago: 'It meaneth not my adequacy to be satisfactory.' You who are skilled in the interpretation of wills, contracts, and statutes must decipher this for yourselves. The job may be equal to an interpretation of the League of Nations. Do not be alarmed, my brethren. This is not the subject of my address. We have invited you here as our guests and do not wish to disperse you on the first day. Our young men think they

have much to show you, and to learn much from the meeting with so many able and experienced men of the profession, to say nothing of the pleasure of association with so many congenial and delightful companions, as nearly all lawyers are—or at least were before prohibition stalked into our midst. Whether our constitutions will change with the other constitutions, who can say? At any rate until the stocks on hand are depleted, and the bootlegger is finally suppressed, we are not entirely bereft. For the present we are living under the headway of the past, and we defy the enemy. As to the future we can join with the illustrious Micawber in 'waiting for something to turn up.'

"In the meantime the members of the committee, as well as the members of the bar generally, will do their best in dispensing Dayton hospitality in accordance with the precedents heretofore established. And in their behalf and on behalf of the citizens of Dayton we welcome you with the greatest cordiality, wishing you as much pleasure in your visit as you have conferred pleasure and honor by coming to see us.

"The city is yours for the time being. Do not fear to avail yourself of its privileges. The judges of all the criminal courts, the whole staff of the office of the prosecuting attorney and of the office of the city solicitor are with us in this greeting, and to make assurance doubly sure the judges who preside in the courts of last resort will be particeps criminis, and unfitted to judge you harshly. We can not guarantee you against one powerful member of society, however. You must take your chances with the rest of us with the autocrat of the automobile. When you get to the street crossing our warranty of safety expires. Keep your eyes on the traffic policeman, say a short prayer, think of the dear ones at home, cast your eyes both ways for a car, especially in the direction the car is coming, and start across with hope, if not with confidence. If anything untoward happens, the worthy coroner will give you a verdict; those of us who are left will commemorate your memory in resolutions that would surprise you in the next world, if as Sir Oliver Lodge says, there is communication between the spirits of the seen and the unseen world. We can not say that you died upon the glorious battlefield of Cantigny, Chateau-Thierry, or the deadly Argonne, but we will come as near to it as a decent regard for truth will permit. One other danger we can assure you against. Although you are all 'intellectual,' no Lenin or bloody Trotski will bar your way.

"All jesting aside, my brethren, this is a memorable occasion, and I hope it will be a memorable meeting. The profession we represent is one of immense importance. While the most of us are engaged in no greater work than the settlement or trial of disputes between neighbors or business men about contracts, wills, personal injuries, patent claims, etc., this individual work is the necessary part of the great system whereby the fabric of government is made stable. In the great variety of business which grows up in a civilized community, society is divided into innumerable specialized occupations. Some are farmers, merchants, manufacturers, machinists, doctors, ministers, railroaders, bakers, teachers, druggists, day laborers, clerks, lawyers, bookkeepers, etc. Most of them are productive occupations; some, especially the professional ones, are nonproductive, but equally as essential to society as the others. All are necessary

to a civilized community. Each one fills a niche, and when he performs his duty, obeying its laws and fulfilling his duties as a citizen, such person is an honorable member of his State or city, no matter how humble his occupation or how moderate his income.

"Lawyers can boast that our profession leads us into broader paths than almost any other occupation. In settling the controversies that arise in our communities we are the ministers of justice and assist in the preservation of the peace. In the handling of these disputes we must frequently familiarize ourselves with the details of the business in which they arise. In a city of the size of Dayton, or even smaller, a lawyer may become for the time being a doctor, a surgeon, a minister of the gospel, a chemist, a bookkeeper, a skilled mechanic in any trade in order to understand his case and its technical testimony and to cope with the vagaries of those who are called as experts in the business. We have one additional cause for pride. Many of us are called into positions of honor, where an accurate knowledge of law is essential. We are all born members of the legislature or of Congress, and might all be there if there was room enough. The broader questions of city, State, National, international government are ours to settle when law is involved, and while the positions are few compared to the large number of lawyers, the road to the highest position is broad and opened to us all. Neither birth, nor wealth, nor other European qualifications is necessary. Industry, integrity, perseverance, and brains are the only essentials.

"We have a right to be proud of our profession and of its history and the record of its members. They have stood in the forefront when liberty was concerned. I do not need to allude to the pages of English history. The American Revolution is sufficient object lesson. In the military annals of that period what names more striking than Hamilton, Marshall? And when the war was won who took the leading part in the framing and adoption of the great charter of our liberties, the Constitution, by which the States were bound together by solemn agreement? The story has been so often told to us in childhood and manhood as to need no repetition before so learned an assembly.

## LOOKING TOWARD THE FUTURE.

"In these times the future is more important than the past. Our forefathers fought for and achieved liberty. They established perpetual peace by the league of States or a union of the people of the States, if you prefer the language. It is our duty to preserve the Union by preserving the Constitution, which is its sole tie. It is the agreement under which we came together. If we abandon the agreement, a condition of Balkanism would arise far exceeding in disastrous results the European imbroglio. It would install war instead of peace, anarchy in place of government, and barbarism, finally, instead of civilization.

"The war has disturbed and prostrated Europe and Asia. Its results have not been fortunate for us. We are confronted with all sorts of problems—chief among which is the high cost of living, the antics of a few thousand mild-eyed foreigners, and what Shakespeare would call 'the damnable iteration' of the United States Senate in its never-ending gabble over the treaty. The audience need not be alarmed. I will not discuss any of these. As a distinguished gov-

ernor of Ohio once said, in real gubernatorial language, when he was seeking to quiet the inmates of a hotel when a midnight fire was in progress near by: 'Do not be alarmed, ladies, the fire is not here; it is elsewhere.'' So with my discussion. It is 'elsewhere.' Among other internal troubles we have had strikes of every kind, in every place, and for all sorts of reasons. I am not about to discuss them. But they lead up to a situation in our affairs which concern us most intimately as lawyers or judges or persons connected with government and as lovers of our form of government.

## LABOR'S PLATFORM.

"Pending one of the great strikes in which the miners believed themselves justified in freezing the innocent bystanders all over the United States in order to compel a few employers to comply with their demands (about the justice of which I, in common with many others, am unable to give an opinion), President Gompers called together at Washington a formidable meeting of the representatives of 119 national and international unions said to represent 4,000,000 workers tied up with The American Federation of Labor. The purpose of the meeting was to formulate a platform of principles, and to lay down the law to Congress, the administration, and all other evil-minded persons.

"There is much in this platform to which no exception can be taken. Much of it is mere platform stuff intended for the groundlings. But there are some propositions that should be fully considered and discussed by lawyers, as they concern us especially.

"I quote from the reported platform as follows:

Powerful forces are seeking more and more aggressively to deny to wage earners their right to cease work. We denounce these efforts as vicious and destructive of the most precious liberties of our people. The right to cease work—strike—as a final means of enforcing justice from an autocratic control of industry must be maintained.

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We realize fully all that is involved in the exercise of the right to strike, but only by the exercise of that right can industrial autocrats be compelled to abandon their concept of tyranny and give way to the establishment of freedom and justice in industry.

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Government by injunction has grown out of the perversion of the injunction process. By the misuse of that process workers have been forbidden to do those things which they have a natural and constitutional right to do.

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The injunction as now used is a revolutionary measure, which substitutes government by judicial discretion or bias for government by law. It substitutes a trial by one man, a judge, in his discretion, for a trial by jury. This abuse of the injunctive process undermines and destroys the very foundations of our free institutions. It is subversive of the spirit of a free people working out their destiny in an orderly and rational manner.

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We urge that the judges of our Federal courts shall be elected by the people for terms not exceeding six years.

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We assert that there can not be found in the Constitution of the United States or in the discussions of the Congress which drafted the Constitution any authority for the Federal courts of our country to declare unconstitutional any act passed by Congress. We call upon the people of our country to demand that the Congress of the United States shall take action for the purpose of preventing the Federal courts from continuing the usurpation of such authority.

"Here is a carefully prepared platform, the work of some lawyer which not only concerns us as members of the profession, but every citizen who loves his country and believes that its prosperity depends upon the enactment of good laws, their observance and the preservation of order, through the power of the courts, as the proper authority to determine what are the rights of men or associations of men, when controversies arise between them—especially when the numbers are great and threaten the peace of society.

"The Federation of Labor is manifestly within its rights in announcing its platform. It does not advocate force to overthrow the Constitution. And as it denounced the methods of the I. W. W. and the Bolsheviki, it has a right to urge the adoption of its ideas as stated in its platform by the methods and in the manner provided in the Constitution. And the members of the unions are entitled to proper consideration of their views. It has been too much the habit to denounce the ideas of persons with whom we disagree, or whose views are inimical to our interests. It is our duty as lawyers to take up these subjects in our counties when they arise, and to give to the people and especially to members of the unions the proper argument to show them the fallacy of their theories or the falsity of the facts upon which some of them are founded, if we do not agree with them.

## THE RIGHT TO CEASE WORK.

"I approach this argument with this feeling: The great multitude of our people have little acquaintance with the situation and are open to conviction. And our profession puts us under obligation to furnish them the information upon which they must act, for this has been our life study.

"I have said that this part of the platform was prepared, in my judgment, by a lawyer. It is as remarkable for what it does not say as for what it claims. For example, under the title 'The right to strike,' we find the words used to describe this right as follows: 'The right to cease work, strike, as a final means of enforcing justice from an autocratic control of industry.' Here the official definition of the word strike is 'the right to cease work.'

"If that is the whole meaning of the word 'strike' we shall have little quarrel, except in the case of policemen, firemen, railroad men in a body, and other public employees who owe a duty to the public, and whose services are essential to the public life or safety. As to them even no one will doubt the individual right to resign; that is, to 'cease work,' when they find better employment. But to become affiliated with another powerful organization and subject to its orders, assuming inconsistent obligations, and pursuant thereto to resign in a body and abandon the great city of Boston to the thugs of their own and other neighboring cities, was an unspeakable offense, deserving of the punishment it received, and the public condemnation of the demagogues who abetted them, in the election of Gov. Coolidge, notwithstanding the efforts of trimming politicians to prevent it.

"Outside of the claim made that public officials should not be permitted to connect up their own local organizations with the American Federation and be subject to their orders there is no recorded case where workingmen have been compelled to return to work by the order of any court, even where the unions were bound up by contracts

in writing which had not expired. There is no law that compels a man to work when he chooses to cease work. Of course, a general coal or railroad strike intended to freeze or starve the general public presents a special question. Every Government is entitled to preserve itself or its people when the conditions arise that necessarily follow a general concerted and simultaneous quitting of work—especially when it is in possession of the war powers still existing.

"Evidently the shrewd lawyer who drew the platform appreciated the difficulties of his job. We all know that in common parlance and practice the word 'strike' means much more than 'ceasing work,' and it is this part of the practice that has been enjoined by the courts. We know, as a matter of fact, that when a general strike is called at any factory or other place of work it is not long before pickets, sometimes in large numbers, are thrown out to cover every approach by new hands. Persuasion, intimidation, and violence are often used to prevent anyone from going to work. The police are called in. Finally the troops.

## THE RIGHT TO PICKET.

"Does the right to strike extend to the right to picket and the persuasion of new workers not to enter the factory? If so, how many pickets? Or does it extend further to intimidating either the employer or his new workers? Or may the men who have 'ceased to work' finally resort to violence at the factory or in the streets or in the alleys at night, or maiming those who may be willing or anxious to work in the deserted factory, or who are so engaged?

"When strikes take place and intimidation or violence actually result, who shall be the judges as to how far the rights of the parties extend? The two contending parties have no tribunal to appeal to, except the established courts of the country, the judges thereof being most generally men of learning in the law and unimpeachable integrity, whose independence, if at all qualified, leans more to the man who labors than to his employer. When the court finds that the worker has exceeded his right to strike by resorting to intimidation or persuasion amounting to intimidation or violence, or other exceptional means, it issues an injunction to prevent the invasion of the other man's rights and he is punished for contempt if he disobeys.

"Here I again recur to the platform, particularly to that part which proposes to abolish injunctions in such cases. Here facts are falsified, or at least so colored as to amount to a fraud upon the honest union man who has not contrary knowledge. The platform avers that by the misuse of the injunction 'workers have been forbidden to do those things which they have a natural and constitutional right to do.' It may happen in isolated cases that judges may have erred or been extreme from want to knowledge or from the circumstances surrounding the case. But I deny that any respectable court, especially of the last resort, 'has forbidden workers to do things which they had the natural or constitutional right to do.' The astute lawyer who drew these declarations was too keen to specify the things which judges had so ruled. Specification was dangerous. He knew the rulings of the courts are all a matter of record, and that if the things complained of were wrong he had only to cite the case and the facts to let us know what right had been denied the worker and when and where. The Supreme Court of the United States has made a

record upon these questions, and nearly every State supreme court as well and to one who has knowledge of what has been decided this part of the platform is a combination of deceit and falsehood, worked up in fustian style to deceive the worker by the use of clap-trap language, viz: 'Government by injunction,' stating untruly that injunction as now used is a revolutionary measure, which substitutes government by judicial discretion or bias for government by law. I affirm the contrary. It enforces only those rights which exist in law and prevents the overthrow of law and order by forbidding the invasion of the rights of others by force or intimidation. It is an ancient familiar remedy and properly applied when the situation calling for and justifying it occurs.

"Let us examine the familiar uses to which the writ of injunction is put—the great bulwark provided by the law from ancient times to prevent the oppression of the weak by the strong. And there let me quote the first section of the bill of rights of the Constitution of Ohio, being Article I:

"SECTION 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying life and liberty, acquiring possession and protecting property, and seeking and obtaining happiness and safety.

"This is to a certain extent duplicated in the thirteenth, fourteenth, and fifteenth amendments to the United States Constitution.



"A more comprehensive statement of the foundations upon which a republic is based can not be found anywhere. It is not a preamble. It is a declaration of rights innate, inalienable. I see in it no distinction of classes. Based upon this declaration, which has been in our constitution practically since it became a State, and other provisions of that instrument, courts of equity have habitually granted injunctions in the greatest variety of cases. For the benefit of the person unlearned in the law I state a few. The bar is well informed on this subject.

"If there is a line dispute between two farmers or lot owners in a city, and the man of force undertakes to throw down the fence, the man of peace is accorded an injunction to prevent the removal until the court finds out who is right. So if one owner builds a dam and floods his neighbor's farm, or diverts a spring or a stream of water necessary for his cattle and household purposes, or shuts up a right of way to the public road, or digs a ditch which throws the water into unusual channels, the court interferes. So if a man steals your patent, is guilty of unfair competition, counterfeits your trade-marks, or endeavors to persuade your valuable clerks who are under contract or your inventors who have secrets and confidential information, the court of equity steps in with an injunction. If you sell a lot with building restrictions, equity compels the purchaser to observe them by forbidding him to violate his contract. If a nuisance is about to be erected in your neighborhood, you can depend upon the court to give you protection. If an improper tax or assessment is levied upon property, you can enjoin the collection until its propriety is tried. If the city council passes an illegal ordinance, under which your rights are invaded, you can enjoin action until its validity is passed upon. If you own a piece of property and some one is claiming an

adverse interest, you can enjoin him from asserting it, as it damages your title, and a trial is had. And the courts have gone so far as to protect the divorced wife of a scalawag who haunts the house and the neighborhood and makes her life miserable by his conduct.

"This array of instances in which the court acts is formidable. But it is not complete. The area of jurisdiction is as wide as that of human rights invaded by unscrupulous men. Are all these remedial measures to be abolished, because they are 'government by injunction'? In all the above cases the judge alone tries the case, finds the facts, and makes the order—if he is not obeyed he cites the party for contempt and may or may not try the question himself. The court compels the wrongdoer to desist from this work, because he is invading the rights or property of his fellow man. All this is 'government by injunction'—viz, compelling a man to do his duty to his neighbor. Can any laboring man point out the difference between all these cases and the cases in which injunctions have been issued in strike cases? Can any lawyer put us wise? I think not. I do not so much blame the member of the union who trusts in his leaders and their legal advisers. But I do blame the leaders who are endeavoring to make them believe that they are the victims of usurping courts, who ignore their rights and trample them down, when there is no proof and none can be provided. I have a firm belief that a large portion of the union men do not understand the situations. I speak to you, and through you to them, as I now do. These men are among the most intelligent of our laboring class. In legal matters they are not learned; they need our help, not our abuse. And we owe to them all the help in our power to come to a just decision. It is not enough in a republic to say that such is the law and condemn everyone who does not obey. A further duty we owe to the public, viz, to prevent it from falling into disrepute by false charges of favoritism, oppression, usurpation, etc., unchallenged and undenied. We want not only a law-abiding community. We want a contented community. And it is a good sign of the times that many employers are adopting methods in their relation to their employees that may bring about such a result. Perfect peace is not possible. But let us have all we can.

"Now I base my hope of good results from education and publicity upon what I know after long experience of efforts to throw the labor union question into politics. It has rarely been successful. I have one very striking instance in my mind. The Ohio constitutional convention of 1912 was practically in the hands of labor. Many amendments were proposed to our constitution and, under the belief that change means progress, many of them were adopted by the people, some valuable. The subject we are now discussing was under consideration and the convention adopted the following, being section 21 of Article IV:

"SEC. 21. Laws may be passed, prescribing rules and regulations for the conduct of cases and business in the courts of the State, regulating proceedings in contempt, and limiting the power to punish for contempt. No order of injunction shall issue in any controversy involving the employment of labor, except to preserve physical property from injury or destruction; and all persons charged in contempt proceedings with the violation of an injunction issued in such controversies shall upon demand be granted a trial by jury as in criminal cases.

"It was voted on by the people in September, 1912, as a section by itself. This was labor's pet proposal.

"Now look at the result. The people voted it down by a majority of 16,406. Cuyahoga County voted yes by about 30,000, Hamilton yes by 20,000, Lucas yes by 8,000, and Franklin by 1,700.

"Contrast the vote in the great manufacturing centers in the Miami Valley. In the counties of Montgomery, Clark, Miami, Greene, Shelby, Preble, Warren, Butler, and Darke the majority against the amendment was 11,500—only two counties voting yes, one by 100 votes, the other by 240.

"This result shows what discussion will do. A vigorous campaign of instruction brought it about. Labor could not rally its members in a body in support of its platform. The question is settled in Ohio.

## ELECTIVE JUDICIARY.

"Two more points remain to be considered. The union leaders demand that the Federal judges shall be elected by the people and for terms of six years only.

"Whatever may be said for or against an elective judiciary in counties, districts, or States, one can not help believing that an elective Federal judiciary would be the downfall of the whole system. Our forefathers discussed these matters most fully, and it was concluded that in a combination of independent States a thoroughly independent and separate judicial system was essential to its success. Let us imagine what would result if labor's plan was adopted. First, we should have primary elections over the whole United States, involving the candidates in a campaign to become known. Then we should have a campaign of election. Every conceivable political trick would be put in use by friends or advocates of the candidates. There would be combinations of States, candidates, or of special interests, politicians, etc. Money would be contributed by the friends of the candidates, having schemes to promote or ends to subserve, and the bench would become the roosting place of rich lawyers, or lawyers having rich friends, or backed by interests or classes, and they would in all probability reach the bench, leaving behind them their independence, at least, the chief jewel in the crown of the judge. But I do not fear that labor will ever achieve its point. It is not to its interest that it should. The Constitution provides expressly that all Federal judges shall be appointed during good behavior, and an amendment would be necessary to change it. And when change is attempted there will be ample time for discussion.

"One more demand is to be considered. It is that Congress shall take action to prevent the Federal courts from declaring an act of Congress unconstitutional. Such actions by the courts is declared to be 'usurpation.'

"Why the federation did not also denounce similar actions by State courts as to acts of the State legislature, and as to acts of Congress, one can not conceive. All State supreme courts exercise now the power to declare State laws or Federal laws unconstitutional; and they exercise the power as inherent in the court without express grant, as a necessary result of our system of government. And why did it not denounce the exercise by Federal courts of the power to declare laws passed by the States unconstitutional, if these laws violated the Constitution of the United States—a power exercised every day?

BAD LOGIC.

"The facts and logic of the platform are bad. In early English days, before the Revolution, it was held by able English judges—Coke, Hobart, Holt, and others—that an act of Parliament contrary to Magna Charta, common right, or justice was void. The Revolution was largely based upon this denial of unlimited parliamentary authority. It was called a 'lawyers' revolution.' John Adams said:

"The stamp act, I take it, is utterly void and of no binding force upon us, for it is against our rights as men and our privileges as Englishmen.

"As there was no court or tribunal to which our forefathers could successfully appeal, nothing was left but a resort to arms.

"In the Articles of Confederation first adopted between the States, which was nothing more than a league, express power was granted to Congress to provide for the settlement of disputes, and a method was adopted which was not satisfactory.

"When the Convention was in session, when our present Constitution was adopted, the question we are now discussing was under consideration. I quote from the third report of a committee of able lawyers, five in number, made in January, 1917, to the New York State Bar Association:

"Judicial review is a world-wide practice in federations. Judicial review of the validity of laws is as much a world-wide practice in federations as is the ratio at which gold and silver should be coined. Its only rival in federations is the German system of a Federal council (State government appointed without the voters of either the States or the Empire having any voice in the matter), which, when in accord with the Kaiser, had plenary or dictational powers. Madison, Washington, and Hamilton, with the support of the Virginia school, tried their best to incorporate a Federal council or council of revision into our Federal Constitution, but they were defeated by Massachusetts and the more democratic States. Then the fathers resorted to judicial review. (Citing Hamilton, Jefferson, Madison, and Farrand's records of the Federal Convention.)

"In a previous report by this same committee, made in November, 1915, most exhaustive in its character, it proposed the following resolution, which was adopted by the State Bar Association of New York on January 15, 1916:

"*Resolved*, That any contention that the Supreme Court of the United States in enforcing the Federal Constitution has usurped the power to pass upon the constitutionality of the legislation enacted by Congress is contrary to both the letter and spirit of the Federal Constitution, is unwarranted by the history of the United States, and by the history of federations possessing a written fundamental law, but without any Federal council with plenary powers to determine conflicts between the fundamental law and ordinary statutes, and it is also contrary to the spirit of our Federal democratic Republic with 49 legislative units (1 federation and 48 States).

"*Resolved*, That the theory of our Government, State and National, is opposed to the deposit of unlimited power anywhere.

"In the citation of European and other States having a similar system of ours a significant instance is referred to by the committee.

"In Australia, the great labor Commonwealth, it was proposed to amend the constitution by providing that Parliament should have absolute and plenary power to make laws with regard to labor and employment, including the wages and conditions of labor and employment in any trade, industry, and calling. This was voted down by the people on a referendum April 16, 1911.

"In Ohio none of our constitutions conferred power upon the judiciary to declare laws unconstitutional. The courts have exercised the power since the State was formed. It is an inherent power.

Our last constitutional convention provided a limitation upon the number of judges who should join in the opinion, thus recognizing the power as existing.

"It is surprising that any question should ever have been made by lawyers on this point. Of course we expect nothing from politicians or agitators. As to lawyers we must, however, remember that we are not all cast in the same mental mold. A small number, comparatively, of good men and able men have gone wrong upon this proposition as most of us see it, but their mental operations are different from ours, their point of view is different, and their natural sympathies may overbalance their logical gifts.

"What is the power to declare a law unconstitutional? It is not an academic question which can be decided unless a case arises between individuals, involving rights.

"As an example: A sues B, B answers and puts up his defense. A claims to be acting under a statute. B says that the statute is not good, that he is living under a government with a written constitution and the statute is contrary to his rights as secured by the constitution. This right might be to vote, to be a free man, to own his own property, to belong to a religion, to exercise the right of free speech. Let me give you a more striking illustration. The platform denounces the Cummins railroad bill and all similar legislation as 'making slaves of the workers and establishing involuntary servitude.' This is mere bombast. But, if true, the workers may need the thirteenth amendment to the Constitution to save them. It prohibits 'involuntary servitude,' and the law could be declared unconstitutional by the Supreme Court and would be if the claim was anything more than mere rhetorics.

"To return to our case. The judge has the case to decide. The right of A under the statute is clear if the statute is good. But the right of B under the Constitution is equally clear. Must the statute prevail over the Constitution or must the court give effect to the agreement contained in the Constitution? The case must be decided. It must be remembered that no one can attack a law unless it interferes with his rights under the Constitution. Courts interpret wills, contracts, statutes, and all other instruments. Why not the Constitution? If on interpretation of the Constitution its clauses conflict with the statute why shall the mere act of a legislature, passed probably in haste and frequently in ignorance, overcome the solemn agreement between the people under which they have agreed to be governed.

"To you lawyers and judges this talk may seem prolix and foolish and unnecessary. If only lawyers are to decide the issues, the agreement is silly. This question has been before the people since the birth of the Union. The great law chieftain, John Marshall, started the ball in the early decision in Marbury *v.* Madison, upsetting an unimportant Federal law. The various States having passed laws in derogation of the Federal Constitution, on appeal to his court these laws were set aside. The powers of the Supreme Court became the football of politics for years, judges of the district court were impeached, and the battle between the Federalists and Republicans was on for a long time. At one stage of the campaign John Marshall was burned in effigy in the streets of Baltimore. But when nullification came on in 1830 the people discovered in the discussion that

some tribunal was necessary in a government acting under written constitutions and the people settled down. There has been no important disturbance until now. Those who are endeavoring to revive the questions must remember that the practice and the decision of courts in a country like ours, for the period of over 120 years, can not be denounced or overturned merely for the establishment of class legislation.

"Roosevelt said in 1911 that the right of the court would seem to be self-evident, that Marshall's decision made him a great leader and was necessary to make the Constitution march.

"Notice has been given that every candidate for Congress, or other office, will be stood up in the corner, and quizzed as to his views about the platform. Politics are to be ignored, and only those who fall down before the idol are to be supported. We can imagine the feelings of the unfortunate man. For once the politician will be brought to time! Of course it follows that if political affiliations are all to be thrown down, we can all vote as we please.

"This address has gone far beyond what I contemplated. But it is my contribution, small as it is, to information upon subjects of vast importance to the public.

"You who wish to inform yourselves more fully should possess yourselves of a book of great value, which has surprised me by the learning and exhaustive research shown by the various authors whose articles or speeches are reported. I refer to a book entitled 'Judicial Settlement of International Disputes,' containing the proceedings of the American Society for their settlement for the year 1916, published by Williams & Wilkins Co. of Baltimore. In the appendix to this volume will be found the voluminous and scholarly reports of the committee of lawyers to the New York State Bar Association, chiefly upon the subjects we have been discussing. It is a most complete compendium of the law and practice of the whole civilized world upon the powers we have been considering. No lawyer should be without it.

"The great tribunal of our country—to my mind the greatest in the history of the world—is threatened by dreamers, agitators, and timid politicians. It is the foundation of our Government. This court has settled by judicial decision disputes among the States of our Union in over 70 cases, many of which would have led to war but for the dignified tribunal established by law to finally decide such questions. Shall it have no power to preserve constitutional right? Let us preserve the independence, the learning, the integrity, and the impartiality of that court as the corner stone of our Republic. And upon us lawyers rests the great duty, and it should be our great pleasure as well, to step into the breach, to inform our fellow citizens, and in the true spirit of the educator to scatter broadcast the knowledge that will provoke our people to do what is right, no matter what is his occupation, his interest, or his association."

A few words more. In a few days I will be 87 years of age, a long life during a most eventful period. I have seen all our railroads built, our telegraphs and telephones, the aeroplane and the submarine invented, and electricity made as obedient as the horse. I have seen the country grow to 110,000,000 free and prosperous people.

I have seen the War with Mexico, the Civil War, the War with Spain, and the terrible war just ended in which 2,000,000 American boys convinced Germany that her end had come. I have seen the President of the United States liberate, by the stroke of his pen, 4,000,000 of negro men, real slaves, and the whole race, free and slave, elevated to a political equality with the white. I have seen our President, speaking from the pinnacle of his high office to the downtrodden people of the world, flooding it with more freedom than it could stand, but seeding all Europe with republics as plentiful as languages. I have seen women enfranchised in most of the civilized countries of the world, and an American-born woman elected and seated in the British House of Commons. And when I look over our country and behold it leading the world in the cultivation of the earth, the output of the factory, the number and value of its inventions, the size and number of its banks, insurance and trust companies, the extraordinary bulk of deposits in the laboring classes, the comfort in their homes, and the improvement in their wages and general prosperity, I wonder if this is the same country that the American Federation of Labor refers to in its platform, and who built or control all these great businesses, railroads, banks, factories, stores, and enterprises that have put America to the front? Are they dukes, princes, earls, counts, or barons, or their sons, or the son of the rich man? By no means.

Nine out of ten are the boys from the farm, only half educated, or from the factory with hardly a high-school education. They came from the so-called enslaved class.

America is good enough for me, or for anyone else, although she is not perfect. But I take no stock in such Americans as foul their own nest, revile their Government and its officers, especially the honorable judges of our courts, because of temporary evils, the necessary result of a great and wasting war.

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